IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 892 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHHATRASINH S SOLANKI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 892 of 1993

MRS SHILPA J UNWALLA for the appellant

MR KG SHETH, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

By filing this appeal under section 374(2) of the

Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated August 5, 1993 rendered by the learned Additional Sessions Judge, Panchmahals at Godhra in Sessions Case No. 154/92, by which he is convicted of the offence punishable under section 302 of the Indian Penal Code and punished with imprisonment for life and fine of Rs. 500/-, in default R.I. for one month.

2. The complainant i.e. Kanubhai Jibhai Solanki is a resident of village Bodidra, Taluka : Kalol, District : Panchmahals. In village Bodidra, one Somabhai Harsingbhai had grown palm trees on his land. The appellant was looking-after the palm trees and was sleeping in the part of the said field. The name of uncle of the complainant is Narvatsinh and name of son of Narvatsinh is Dharmendrasinh. Dharmendrasinh used to sit and move in the company of the appellant. The appellant was offering him toddy (spirituous exudation obtained from palm tree) and was spoiling him. On May 7, 1992, the appellant had come to the house of Dharmendrasinh and taken Dharmendrasinh with him on the pretext of extracting honey from honeycomb. The complainant and deceased Rangitbhai had followed them and found that the appellant as well as Dharmendrasinh were sitting on a cot. Thereupon the complainant and deceased Rangitbhai had asked the appellant as to why he was spoiling Dharmendra by offering toddy. It is the case of the prosecution that thereupon the appellant had abused complainant Kanubhai and deceased Rangitbhai. The appellant had told the complainant that he was going with Dharmendra to leave Dharmendra at his house. After leaving Dharmendra at his house, the complainant had returned to his field and at that time, complainant Kanubhai and Rangitbhai were also in the field of the appellant. The prosecution has alleged that on seeing the complainant and Rangitbhai in his field, the appellant had started abusing them and his brother Ganpatsinh had also come to the field of the appellant and had started abusing Kanubhai and Rangitbhai. When deceased Rangitbhai asked the appellant not to abuse him, the appellant had given a push to deceased Rangitbhai, as a result of which deceased Rangitbhai had fallen down on the ground. The case of the prosecution is that thereafter the appellant had taken out a small dharia from his waist and given one blow on the neck of deceased Rangitbhai, as a result of which deceased Rangitbhai had profusely bled and shouts were raised by complainant Kanubhai. On shouts being raised, people had collected there and they had found that Rangitbhai had died on the spot. Complainant Kanubhai had thereafter lodged

complaint with Kalol Police Station on May 8, 1992 at about 9.15 A.M. The complaint filed by Kanubhai was registered by P.S.I. Mr. G.T.Barad. After registration of complaint, necessary investigation was made and on completion of investigation, the appellant and his brother Ganpatsinh Somabhai Solanki were chargesheeted of the offences punishable under sections 302 & 504 read with section 114 of the Indian Penal Code in the Court of learned Judicial Magistrate,First Class,Kalol. As the offence punishable under section 302 I.P.C. is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Panchmahals at Godhra for trial, where it was numbered as Sessions Case No. 154/92. The charge at Exh.2 was framed by the learned Judge against the appellant as well as his brother of the offences punishable under sections 302 & 504 read with section 114 I.P.C. The charge was read over and explained to the appellant and his brother, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined, (1) Dr. Sureshbhai Isabhai Isnava, PW.1 Exh.8, (2) Chandrasinh Amarsinh, PW.2 Exh.11, (3) Amarsinh Madhavsinh Parmar, PW.3 Exh.12, (4) Anilkumar Girvatsinh Parmar, PW.3, Exh.15, (5) Chandrasinh Amarsinh Solanki, PW.4 Exh.18, (6) Ahmad A.Rahim Jamanu, PW.5 Exh.20, (7) Kanubhai Jibhai PW.6 Exh.22, (8) Shabhaibhai Ramsinh Solanki, PW.7 Exh.24, (9) Vajesinh Mohansinh PW.8 Exh.25, (10) Dasharathsinh Himatsinh, PW.9 Exh.26, (11) Dharmendrasinh Narvatsinh Solanki PW.10 Exh.27, and (12) Gopalsinh Takhatsinh Barad, PW.11 Exh.28, to prove its case against the appellant and his brother. The prosecution also produced documentary evidence, such as inquest report at Exh.6, postmortem notes of the deceased at Exh.10, arrest panchnama of the accused at Exh.13, discovery panchnama at Exh.16, panchnama of scene of offence, complaint lodged by Kanubhai at Exh.23 etc. in support of its case against the appellant and his brother. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and his brother the circumstances appearing against them in the evidence of prosecution witnesses and recorded their statements as required by section 313 of the Code of Criminal Procedure, 1973. In their further statements, the appellant and his brother denied the case of prosecution, but did not examine any witness in support of their defence. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Rangitbhai died a homicidal death. The learned Judge referred to the evidence of eye witness Kanubhai Jibhai and held that his evidence was reliable, cogent and

consistent. The learned Judge after relying on the evidence of complainant Kanubhai held that it was proved by the prosecution that the appellant had inflicted blow with a small dharia on the neck of deceased Rangitbhai and had caused his death. The learned Judge held that no evidence was adduced by the prosecution to prove that the brother of the appellant had abetted the appellant in the commission of crime. In view of above-referred to conclusion, the learned Judge has convicted the appellant of the offence punishable under section 302 I.P.C. as well as imposed punishment which is referred to earlier, and acquitted the original accused no.2, by judgment dated August 5, 1993, giving rise to the present appeal.

3. Ms. Shilpa J. Unwalla, learned counsel for the appellant, after taking us through the entire evidence on record, submitted that the evidence of eye witness Kanubhai Jibhai is full of contradictions, material omissions as well as unreliable and, therefore, his evidence should not have been relied upon by the learned Judge for the purpose of convicting the appellant of the offence punishable under section 302 I.P.C. In the alternative, the learned counsel submitted that the incident in question had admittedly taken place in the field of the appellant and as the evidence led by the prosecution establishes that there was grappling and exchange of abuses between the appellant and the deceased, the offence committed by the appellant would be one punishable under Part-I of Section 304 I.P.C. and, therefore, his conviction should be altered to Part-I of Section 304 I.P.C. and as the appellant has undergone actual sentence of more than 9 (nine) years, imprisonment undergone by him should be imposed on the appellant for having committed offence punishable under section 304 Part-I of I.P.C.

4. Mr. K.G.Sheth, learned A.P.P. pleaded that the evidence of Kanubhai Jibhai is consistent as well as reliable and, therefore, it cannot be said that any error is committed by the learned Judge of the Trial Court in placing reliance on his evidence for the purpose of convicting the appellant. The learned A.P.P. submitted that testimony of eye witness stands completely corroborated by his complaint and as there is no enmity between the complainant and the appellant, evidence of complainant should be accepted by the Court. The learned counsel for the State Government while dealing with alternative argument advanced by the learned counsel for the appellant, pleaded that the appellant had given blow with a lethal weapon on vital part of the body of the deceased, which had caused death of the deceased on the

spot and, therefore, the offence committed by the appellant would be one punishable under section 302 I.P.C. and not under Part-I of section 304 I.P.C. as contended by the learned counsel for the appellant.

5. We have considered the submissions advanced at the Bar by the learned counsel for the parties and reappreciated the whole evidence on record. The fact that the deceased had died a homicidal death is not challenged by the learned counsel for the appellant and, therefore, said aspect of the matter is not discussed in detail. That fact stands amply proved by the testimony of Dr. S.I.Isnava, the postmortem notes prepared by him and produced at Exh.10 as well as the injuries on the dead body of the deceased noticed while holding inquest. The finding that the deceased had died a homicidal death being eminently just is hereby upheld. The evidence of Kanubhai Jibhai PW.6 Exh.22 indicates that in his presence the appellant had taken Dharmendra with him on the pretext of extracting honey from honeycomb and that the appellant who was looking-after palm trees of Somabhai Harsingbhai, was offering toddy to Dharmendra. His evidence further shows that when the appellant had taken Dharmendra with him, the complainant in the company of deceased Rangitbhai had followed them and found that the appellant and Dharmendra were sitting on a cot. The eye witness has specifically claimed that they had tried to know from the appellant as to why he was spoiling Dharmendra and thereupon the appellant had started abusing them. Further it is the case of the complainant that on being scolded, the appellant had gone with Dharmendra to the house of Dharmendra and after leaving Dharmendra at his house, had returned to his field and had started abusing the complainant and deceased Rangitbhai. According to the complainant, when deceased Rangitbhai had asked the appellant not to abuse him, the appellant had given a push to the deceased, as a result of which the deceased had fallen down and when complainant Kanubhai had tried to save deceased Rangitbhai, the complainant was also given a push, as a result of which the complainant had also fallen down. The complainant has clearly stated in his evidence that thereupon deceased Rangitbhai had tried to get-up from the ground and at that time the appellant had taken out a small dharia from his waist and given one blow on the neck of the deceased, as a result of which the deceased had died. The cross-examination of this witness would indicate that he is cousin of the appellant and uncle of Dharmendra. The witness has admitted that on May 7, 1992, marriage of sister of the appellant was arranged and that several persons had gathered to participate in

the marriage. The witness has admitted that at about 8.45 P.M. he had told one Shabhaibhai that they would have to go to Kalol for the purpose of lodging complaint, but as vehicle was not available, they had stayed at the house of Shabhaibhai and had lodged complaint in the early morning on the next day. The witness has denied that he had not stated in his complaint that the appellant had told him and deceased Rangitbhai that he was going to leave Dharmendra at Dharmendra's house and he should not be abused. The witness also denied the suggestion that he has not stated in the complaint that grappling had taken place between Rangitbhai and the appellant and the appellant had mounted on the chest of the deceased. Though some contradictions with reference to his complaint are brought on record, by and large the evidence of complainant has remained unshaken and nothing has been brought on record to discard or disbelieve the sworn testimony of this witness. It is relevant to notice that the complainant is cousin of the appellant and he would not involve the appellant falsely in such a serious case and allow the real culprit to go scot free. Having gone through his entire evidence, we are of the opinion that the same is trustworthy, cogent as well as consistent. The evidence of complainant stands amply corroborated by contemporaneous document viz. his complaint. Therefore, in our view, the learned Judge did not commit any error in placing reliance on the deposition of this witness for the purpose of convicting the appellant.

6. This brings us to the question as to which offence is committed by the appellant. A reasonable reading of the complaint makes it evident that the incident had taken place in the field of the appellant. After the appellant had told the complaint and deceased Rangitbhai that he was going to the house of Dharmendra to leave Dharmendra at his house, neither the appellant nor deceased Ringtails had any reason to stay in the field of the appellant, but the complaint shows that the complainant as well as the deceased had stayed in the filed of the appellant. The averments made in the complaint further establish that after the appellant had returned to his field, an exchange of abuses had taken place between him and the appellant and in fact, grappling had taken place between the deceased and the appellant. If the intention of the appellant had been to cause death of the deceased, he would not have gone to the house of Dharmendra for leaving Dharmendra at his house, but assaulted the deceased immediately when he was asked as to why he was spoiling Dharmendra. The evidence of Dharmendrasinh Narvatsinh Solanki PW.10 Exh.27 shows

_• that a quarrel and fight had taken place between the deceased and the appellant and that he was at his house at the time when the quarrel had taken place. Thus, it is difficult to spell out the intention on the part of the appellant to cause death of the deceased. It is relevant to notice that during the course of exchange of abuses and grappling, the appellant had given one blow and had not taken disadvantage of the situation, nor inflicted blows in succession. Having regard to the totality of the facts and circumstances of the case, we are of the opinion that the offence committed by the appellant would be one punishable under section 304 Part-I of I.P.C. and not under section 302 of I.P.C.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant of the offence punishable under section 302 I.P.C. is set aside and he is convicted of the offence punishable under Part-I of section 304 of the Indian Penal Code. The record of the case shows that the appellant has actually undergone sentence of more than 9 (nine) years and with remission more than 11 (eleven) years and, therefore, we are of the opinion that interest of justice would be served if the appellant is punished with imprisonment which he has already undergone for the offence punishable under Part-I of section 304 of I.P.C. Therefore, the appellant is punished with imprisonment which he has already undergone for the offence punishable under section 304 Part-I I.P.C. As the appellant has undergone the sentence imposed on him for the offence punishable under section 304 Part-I of I.P.C.,the authorities are directed to release him forthwith, unless his presence is needed with reference to any other case. The appeal is accordingly partly allowed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment. Office is directed to send writ forthwith.

(J.M.Panchal,J.)

(A.H. Mehta, J.)

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